

KEYWORD: Personal Conduct; Criminal Conduct

DIGEST: In 1996, the Applicant was charged with two felonies, but found guilty of Second Degree Burglary, a misdemeanor. In 1999, this conviction was cleared from the Applicant's record. In answer to Section 23 on his September 2005 Electronic Questionnaire for Investigations Processing (e-QIP), the Applicant failed to disclose his felony charges. His attorney had advised the Applicant that he was not required to disclose the felony charges on any job applications. Were it not for this advice, he would have disclosed the felony charges. There was no wilful falsification; and as such, no violation of 18 U.S.C. Section 1001. The Applicant has the unqualified support of his superiors in the work place. Clearance is granted.

CASENO: 06-24488.h1

DATE: 05/08/2007

DATE: May 8, 2007

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 06-24488

**DECISION OF ADMINISTRATIVE JUDGE
RICHARD A. CEFOLA**

APPEARANCES

FOR GOVERNMENT

Melvin A. Howry, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

In 1996, the Applicant was charged with two felonies, but found guilty of Second Degree Burglary, a misdemeanor. In 1999, this conviction was cleared from the Applicant's record. In answer to Section 23 on his September 2005 Electronic Questionnaire for Investigations Processing (e-QIP), the Applicant failed to disclose his felony charges. His attorney had advised the Applicant that he was not required to disclose the felony charges on any job applications. Were it not for this advice, he would have disclosed the felony charges. There was no wilful falsification; and as such, no violation of 18 U.S.C. Section 1001. The Applicant has the unqualified support of his superiors in the work place. Clearance is granted.

STATEMENT OF THE CASE

On January 4, 2007, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to the Applicant, which detailed the reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant and recommended referral to an Administrative Judge to determine whether a clearance should be denied or revoked.

Applicant filed an Answer to the SOR on January 25, 2007.

The case was received by the undersigned on March 19, 2007. A notice of hearing was issued on March 27, 2007, and the case was heard on April 24, 2007. The Government submitted documentary evidence. Testimony was taken from the Applicant, who also submitted documentary evidence. The transcript (TR) was received on May 3, 2007. The issues raised here are whether the Applicant's past Criminal Conduct and alleged Personal Conduct militate against the granting of a security clearance. [The Applicant denies any wilful falsification, and any related violation of 18 U.S.C. Section 1001.]

FINDINGS OF FACT

The following Findings of Fact are based on Applicant's Answer to the SOR, the documents and the live testimony. The Applicant is 37, and is employed by a defense contractor who seeks a security clearance on behalf of the Applicant. After a complete and thorough review of the evidence in the record, and upon due consideration of the same, I make the following additional Findings of Fact.

Guideline E - Personal Conduct & Guideline J - Criminal Conduct

1.a. and 2.a. In May of 1996, the Applicant was arrested, and charged with two felonies (TR at page 33 line 11 to page 35 line 24, at page 36 line 11 to page 39 line 12, and Government Exhibit (GX) 2). He was found guilty of Second Degree Burglary, a misdemeanor (*Id*). [The SOR does not allege the 1996 incident as part of the Applicant's Criminal Conduct, but only alleges a violation of 18 U.S.C. 1001.] In 1999, this conviction was cleared from the Applicant's record (Appellant's

Exhibit (AppX) A).

In answer to Section 23 on his September 2005 e-QIP, the Applicant failed to disclose his felony charges (GX 1 at page 20). His attorney had advised the Applicant that he was not required to disclose the felony charges on any job applications (TR at page 26 line 20 to page 27 line 10, and at page 31 line 9 to page 32 line 14). Were it not for this advice, he would have disclosed the felony charges (*Id*). There was no wilful falsification; and as such, no violation of 18 U.S.C. Section 1001.

POLICIES

Enclosure 2 and Section E.2.2. of the 1992 Directive set forth both policy factors, and conditions that could raise or mitigate a security concern. Furthermore, as set forth in the Directive, "[each clearance decision must be a fair and impartial common sense determination based upon consideration of all the relevant and material information and the pertinent criteria and adjudication policy in enclosure 2, including as appropriate:

- a. Nature, extent and seriousness of the conduct and surrounding circumstances.
- b. Frequency and recency of the conduct.
- c. Age and maturity of the applicant.
- d. Motivation of the applicant, and the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the consequence involved.
- e. Absence or presence of rehabilitation.
- f. Probability that circumstances or conduct will continue or recur in the future."

The Administrative Judge, however, can only draw those inferences or conclusions that have a reasonable and logical basis in the evidence of record. The Judge cannot draw inferences or conclusions based on evidence which is speculative or conjectural in nature.

The Government must make out its case under Guidelines E (Personal Conduct) and J (Criminal Conduct); which establishes doubt about a person's judgment, reliability and trustworthiness. While a rational connection, or nexus, must be shown between an applicant's adverse conduct and his ability to effectively safeguard classified information, with respect to sufficiency of proof of a rational connection, objective or direct evidence is not required.

Then, the Applicant must remove that doubt with substantial evidence in refutation, explanation, mitigation or extenuation, which demonstrates that the past adverse conduct is unlikely to be repeated, and that the Applicant presently qualifies for a security clearance.

Personal conduct is conduct involving questionable judgement, untrustworthiness, unreliability, or unwillingness to comply with rules and regulations. The Government must be able to place a high degree of confidence in a security clearance holder to abide by all security rules and regulations at all times and in all places. If an applicant has demonstrated a lack of respect for the law, then there exists the possibility that an applicant may demonstrate the same attitude towards security rules and regulations.

CONCLUSIONS

When the Applicant answered his September 2005 e-QIP, he answered Section 23 to the best of his ability, based on the advice of counsel. The 1996 conviction had been cleared from his record; and as such, he mistakenly thought he was not required to disclose that he was charged with a felony. This being the case, I find no “**deliberate** omission, concealment, or falsification” here, as is required by the first disqualifying condition under Personal Conduct (emphasis supplied). The Applicant testified credibly, as attested to by those who know him; and as such, I find there was no wilful falsification and no related Criminal Conduct (AppX B).

Furthermore, I am not limited to the mitigating conditions, delineated in the Directive, in deciding if an Applicant has demonstrated extenuation or mitigation. Here, those who know the Applicant at the workplace speak most highly of his character, credibility and trustworthiness (AppX B). The totality of the Appellant’s conduct and circumstances, as set forth at length above, clearly warrants a favorable Decision under the “whole person concept.” Mitigation is shown; and as such, Guidelines E and J are found for the Applicant.

Considering all the evidence, the Applicant has rebutted the Government's case regarding his alleged Criminal Conduct and Personal Conduct. The Applicant has thus met the mitigating conditions of Guidelines E and J, and of Section E.2.2. of the Directive. Accordingly, he has met his ultimate burden of persuasion under Guidelines E and J.

FORMAL FINDINGS

Formal Findings required by paragraph 25 of Enclosure 3 of the Directive are:

Paragraph 1: FOR THE APPLICANT

a. For the Applicant.

Paragraph 2: FOR THE APPLICANT

a. For the Applicant.

Factual support and reasons for the foregoing are set forth in **FINDINGS OF FACT** and **CONCLUSIONS**, supra.

DECISION

In light of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant.

Richard A. Cefola
Administrative Judge